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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 700

F. S. GAMBRELL, ET AL.,

Appellants,

vs.

CHALK HILL THEATRE COMPANY, LTD., ET AL.,

Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

STATEMENT OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION AND MOTION TO DISMISS THE APPEAL.

Pursuant to Rule 12 of this Court, this Appellee, the City of Austin, states the following matters and grounds against the jurisdiction of this Court as asserted by the Appellants herein, in their statement of the basis of the appellate jurisdiction, filed herein on the 24th day of February, 1948, as required by Rule 12 of the Supreme Court:

I

The validity of a statute of a State has not been questioned on the ground of being repugnant to the Constitution

or laws of the United States and sustained by a State court as against such contention, and the record in this case does not affirmatively show that a State statute has been questioned on such grounds.

Appellants seek to sustain the jurisdiction on the basis that the validity of a statute of the State of Texas, Ch. 84, p. 257, General Laws, Fifth Called Session, 41st Legislature, 1935, being Article 4646a of Vernon's Annotated Civil Statutes, and an ordinance of the City of Austin was questioned as being repugnant to the Constitution of the United States and that this statute and ordinance were upheld by the State court. It is the position of this Appellee that the validity of said statute and ordinance as being contrary to the Constitution of the United States was not questioned in any of the State courts and that this Court is without jurisdiction of the case. Judicial Code, Section 237, amended; Title 28, U. S. C. A., Section 344. And further, the record in this case does not affirmatively show that a Federal question was presented for decision to the highest court of the State having jurisdiction and that the Federal question was actually decided by such court as has been held to be essential to the jurisdiction of this Court in innumerable decisions. *Southwestern Bell Telephone Co.* v. *State of Oklahoma, et al.*, 303 U. S. 206; *Lynch* v. *New York*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14; *Wilson* v. *Cook*, 327 U. S. 474.

A review of the record in this case will clearly demonstrate that no Federal question was timely presented in the courts below and that the record does not affirmatively show that a Federal question was presented, nor does the opinion of the Court of Civil Appeals in any way show that a Federal question was presented. The record will be reviewed in the order in which it was formed.

Trial Court

Appellants' petition in the trial court (53rd Judicial District Court of Travis County, Texas) does not expressly or impliedly refer to the statute now questioned. The ordinance is contended to be invalid for the reason that it was passed for a private purpose and not for a public purpose. (See pp. 6, 7, and 8, paragraph VII.) But the Constitution of the United States is not mentioned in the petition. Appellants did allege:

> "To close and vacate said streets will be to deprive these plaintiffs of valuable property rights and thereby constitute a taking of plaintiffs' property without due process of law." (p. 6, par. VI)
>
> and
>
> "The said defendant Walter Staehely by filing his purported vacation of the subdivision set out and described above, has cast upon the title to the property owned by the plaintiffs a cloud which in effect is a taking of plaintiffs' property without due process of law." (p. 8, par. IX)

But such allegations are only referable to the ordinance of the City of Austin by implication, and are only referable to the United States Constitution by implication or inference. It is not enough to contend that a statute or ordinance is unconstitutional because such claim, in the absence of anything to indicate the contrary, will be taken as intended to apply to the State constitution and not the Federal Constitution. *Bowe* v. *Scott*, 233 U. S. 658. This case involved an ordinance of the City of Richmond which closed portions of an alley for thirty years. In his bill seeking to enjoin this ordinance the plaintiff alleged "that the ordinance is an attempt to take from your complaints, whose property adjoins and abuts upon the said alley, their rights

in and to said alley without due proces of law." This Court said:

> "But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is referable to the state constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409, 18 Sup. Ct. Rep. 34; Harding v. Illinois, 196 U. S. 78, 49 L. Ed. 394, 25 Sup. Ct. Rep. 176."

Our conclusion is that no Federal question was raised in the trial court nor does the judgment in any way indicate that a Federal question was raised.

Court of Civil Appeals

Rule 324,[1] Texas Rules of Civil Procedure, requires ". . . a motion for new trial to be filed as a prerequisite to an appeal in all cases unless the case is tried before the court without a jury . . ." This case was tried before the court without a jury.

Rule 374,[2] Texas Rules of Civil Procedure, provides that the motion for new trial when required to be filed shall constitute the assignments of error on appeal and that a ground of error not set forth in the motion shall be considered as waived and that where no motion for new trial is required any complaint of the action of the court to be relied upon upon appeal must be "included in the statement of points in the brief as hereinafter provided." In their brief in the Court of Civil Appeals the Appellants set forth three points of error.[2] Neither the ordinance nor the statute was

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[1] Copied in full in Appendix.

[2] Copied in full in Appendix.

questioned in these points of error as being contrary to the Constitution of the United States.

An examination of the points relied upon by Appellants for their motion for rehearing before the Court of Civil Appeals will also show that no Federal question was raised there, and under Rule 374 any contention "if relied upon upon appeal, shall be included in the statement of points in the brief . . ."

Opinion of the Court of Civil Appeals

The opinion of the Court of Civil Appeals assumes the ordinance in question to be void—"So, for the purpose of this opinion, we assume the truth of Appellants' allegations that the ordinance was passed for a private and not a public purpose, and that the ordinance is void." Certainly that does not indicate a decision as to the validity of the ordinance in regard to the Federal Constitution. The opinion does uphold the constitutionality of Article 4646a, citing *Kahn* v. *City of Houston*, 121 Tex. 293, 48 S.W. (2d) 595, where this statute was upheld against the contention that it violated the state constitution. The holding that the statute is constitutional certainly cannot be referable to the United States Constitution because, as seen from the points of error relied upon by Appellants in the Court of Civil Appeals, the statute was not questioned on that ground.

Supreme Court

Rule 469c,[3] Texas Rules of Civil Procedure, requires that the points of error relied upon in an application for writ of error before the Texas Supreme Court must be saved in the statement of points in the brief before the Court of Civil Appeals, and also assigned as error in the motion for rehearing in the Court of Civil Appeals. A reference to

[3] Copied in full in Appendix.

the points of error in these three instruments (Appellants' Brief in Court of Civil Appeals, Appellants' Motion for Rehearing in Court of Civil Appeals, and Application for Writ of Error to the Supreme Court) readily discloses that the Federal Constitution is not mentioned and that neither the ordinance nor statute here involved is asserted to be contrary to the Federal Constitution.

In each instrument the statute is questioned as being contrary to the Texas Constitution, but in Appellants' Motion for Rehearing before the Supreme Court of Texas for the first time the United States Constitution is mentioned and Appellants contend that Article 4646a is invalid under the due process clause of the United States Constitution as well as the Constitution of Texas. The Texas Supreme Court overruled this motion, but such action was not a decision on the Federal question. Under the Texas practice, as seen by Rules 324, 374, and 469c, the Texas Supreme Court is not authorized to consider a point of error not set out in the motion for rehearing filed in the Court of Civil Appeals and not contained in the application for writ of error. *Moore* v. *Dillworth,* Tex. Sup. Ct., 179 S.W. (2d) 940.

> "Questions first presented to the highest state court on a petition for rehearing come too late for consideration here, unless the state court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition."
>
> *Radio Station WOW, Inc., et al.* v. *Johnson,* 326 U. S. 120, and cases cited.

Especially applicable is the following language from *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 857:

> "It is true that when this case reached the Supreme Court of Tennessee the appellant included in its brief, which has been certified as part of the record here, a statement of its legal position which might serve as a

challenge to the validity of the statute. But appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court, (citing cases) and appellant's burden is to show affirmatively that we have jurisdiction." (citing cases)

Conclusion

No Federal question was presented in the highest court of the State of Texas to which this case was presented and the record does not affirmatively show that a Federal question was raised or decided by any of the Texas courts.

II

Assuming that the validity of a statute of the State of Texas, Ch. 84, p. 257, General Laws, Fifth Called Session, 41st Legislature, 1935, being Article 4646a of Vernon's Annotated Civil Statutes, was questioned as being repugnant to the Constitution of the United States and that its validity was upheld as against such contention, the decision of the Court of Civil Appeals is also based upon an independent ground involving local and state law which is sufficient to sustain the judgment in this case. The Supreme Court of the United States will not entertain jurisdiction to review a judgment of a state court when that judgment rests upon two grounds, one of which is a Federal ground and the other a state ground which is sufficient to sustain the judgment. *Fox Film Corp.* v. *Muller,* 296 U. S. 207; *Herb* v. *Pitcairn et al.,* 324 U. S. 117; *Flournoy* v. *Wiener,* 321 U. S. 253.

An examination of the opinion of the Court of Civil Appeals in this case will reveal that the decision was based upon two grounds:

First—that Appellants were not entitled to injunctive relief because they had shown no "taking" or other injury; and

Second—Appellants were denied injunctive relief because of Article 4646a.

Even if it is assumed that this second ground decided a Federal question, the first ground mentioned is independent, involves only local law, and is sufficient to sustain the judgment.

Article 1, Section 17, of the Constitution of Texas, provides

> **"No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . . ."**

It was early held by the Supreme Court of Texas in *McCammon and Lang Lumber Co. et al.* v. *Trinity and B. V. Ry. Co.*, 133 S. W. 247:

> **"While the Constitution provides that, without consent of the owner, his property shall not be 'taken, damaged or destroyed' without compensation, it further says that, when it is taken, 'compensation shall be first made or secured by a deposit of money'. The distinction is thus made by the Constitution itself between taking and damaging, etc., which becomes important when the aid of equity is invoked to prevent action merely threatened. If such action will constitute a taking, the facts that it is without consent and that compensation has not been made render it unlawful so that the property owner has the right to prevent it by injunction. If it will constitute only a damaging, the attempt is not necessarily unlawful merely because compensation is not made in advance; and, if equity will prevent it at all, it will do so only upon the showing of additional facts. It is unnecessary to discriminate between the street and the alley as the decision will apply to both."**

Appellants asserted in their petition in the trial court and in their briefs before the appellate courts below that through their purchase of a lot in the subdivision with specific reference to and reliance upon the deed of dedication and map or plat of this subdivision, duly filed of record in the office of the County Clerk, acquired an irrevocable easement and property right in all the streets dedicated therein, and that the action of the City of Austin in altering the course of one street and closing portions of other streets in the subdivision (none of which abutted on Appellants' property) constituted a taking of their property without compensation. This Appellee vigorously disputed that contention.

In view of the foregoing constitutional provision, it was necessary for the Court of Civil Appeals in determining whether or not Appellants were entitled to injunctive relief to decide whether the closing of the streets involved amounted to a "taking" or "damaging" of Appellants' property. And in order to decide the latter question, necessarily the court had to determine the nature of the interest in the streets acquired by the Appellants by reason of their purchase of a lot in the subdivision. And the answer to this problem involves the construction of the plat of the subdivision approved by the proper City authorities and filed with the office of the County Clerk by the dedicator and the deed conveying the lot in question to the Appellants.

In stating the legal effect to be given to these instruments, the Court of Civil Appeals said that Appellants acquired vested rights in the streets in the subdivision by reason of their purchase of a lot therein, citing *City of Corsicana* v. *Anderson*, Tex. Civ. App., 78 S. W. 261, writ refused. A reference to that decision will show that the court there held that such a purchase as involved in this case constituted a dedication of the streets and alleys in the subdivision and

entitled such purchasers and the city to prohibit obstructions in the streets by injunction and to compel removal of obstructions in the streets by mandatory injunction. That was the nature of the right acquired by Appellants.

Further, when read in conjunction with the remainder of the opinion, it will be seen that the true holding is summed up in this language:

> "Without repeating the undisputed facts as shown by this record, we hold that no 'taking' of appellants' property, under Art. 1, Sec. 17, of our Constitution, Vernon's Ann. St., is shown as there is no physical invasion or appropriation of appellants' property. Duvall *v.* City of Dallas, Tex. Civ. App., 27 S. W. (2d) 1105, writ refused; Johnson *v.* Lancaster, Tex. Civ. App., 266 S. W. 565; Kahn *v.* City of Houston, 121 Tex. 293, 48 S. W. (2d) 595."

The necessary import of this language is that the interest in the streets acquired by Appellants by reason of their purchase with reference to the plat of the subdivision were not of such a nature that their destruction would amount to a taking. Certainly, the construction and legal effect of the plat and deed of dedication of the subdivision and the conveyance to the Appellants is a matter of local law. "The determination by the New Jersey courts of the kind of interest transferred and the time when it was effected is a matter of local law binding on us." *Central Hanover Bank and Trust Co.* v. *Kelly,* 319 U. S. 94.

The Court of Civil Appeals concluded that there had been no taking and that Appellants had alleged no other injuries and therefore were not entitled to an injunction because of the well settled rule of Texas law that one who is not prejudiced or injured by the enforcement of an act of the Legislature or a city cannot question its validity. *Mallott* v. *City of Brownsville* (Com. App.) 298 S. W. 540.

Appellants motion for rehearing in the Court of Civil Appeals, in their first ground, recognizes this holding of the court.

Conclusion

Regardless of the question of the validity of Article 4646a, the decision of the Court of Civil Appeals can be upheld upon the local law that a person who has shown no taking or injury to property is not entitled to equitable relief.

By reason of the foregoing, the City of Austin respectfully moves this Court to dismiss with costs the appeal taken herein to this Court by the Appellants, F. S. Gambrell and Jack Gambrell, because this Court has no jurisdiction as an appellate court to hear and determine said appeal.

Respectfully submitted,

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APPENDIX

Texas Rules of Civil Procedure

Rule 324. Prerequisites of Appeal.

In all jury cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court or to sue out a writ of error, if the judgment of the court is rendered five days or more before the adjournment of the court for the term, or, if, upon request or for any other reason, the court continues the term so as to cover a period of five days from the rendition of a judgment, a motion for new trial shall be filed. It is the object of this rule to require a motion for new trial to be filed as a prerequisite to an appeal in all cases unless the case is tried before the court without a jury, or a peremptory instruction is given in the case, or the appeal is based upon some error arising after the action of the trial court upon the motion for new trial, or unless there is not full five days' time from the rendition of the judgment to the adjournment of the court for the term. Provided, however, that when the judgment is rendered non obstante veredicto, or notwithstanding the jury finding on one or more special issues, the appellee may complain of any prejudicial error committed against him over his objection on such trial. A motion for new trial shall not be necessary in behalf of appellee, except where he complains of the judgment or a part thereof.

An assignment in a motion for new trial shall not be a necessary prerequisite to the right to complain on appeal of the action of the court in giving an instructed verdict, or in withdrawing the case from the jury and rendering judgment, or in rendering or refusing to render judgment non obstante veredicto, or in overruling a motion for judgment for appellant on the verdict.

Rule 374. Assignments of Error.

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required, shall be considered as waived.

Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary.

Rule 469. Requisites of Application.

* * * * * * *

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

Points of Error in brief of Appellants, F. S. Gambrell and Jack Gambrell, filed in the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin:

Point One

Appellants, through their purchase of Lot 15, Block 1, in the Northfield Annex Number Two Addition, with specific reference to and reliance upon the deed of dedication and map or plat of this subdivision, duly filed of record in the County Clerk's Office, acquired an irrevocable easement and property right in all streets and alleys dedicated therein; and injunctive relief is the proper remedy to prevent a destruction of this irrevocable easement and property right, and the trial court erred in not so holding.

Point Two

Article 4646a, Revised Civil Statutes of Texas, as amended has no application to persons other than municipal corporations, and does not prevent injunctive relief where the

municipal corporation has acted solely to further the interests of a private individual; and the trial court erred in not so holding.

Point Three

Error of court in not holding that if Article 4646a, R.C.S., is construed to prevent a person who acquires a private easement by purchase of property with specific reference to a dedication and map from securing an injunction to prevent another person from physically closing such easement, then it is in violation of Article I, Sec. 19, Constitution of Texas.